89-341

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

WILLIAM E. GRADER,
Petitioner

v.

CITY OF LYNNWOOD, a Municipal corporation and political subdivision of the State of Washington,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF WASHINGTON

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QUESTIONS PRESENTED

Whether the Court of Appeals of the State of Washington erred in reversing a jury verdict of $1,650,000 and dismissing a Civil Rights claim maintained under 42 U.S.C. § 1983, which decision thereby denied and circumvented petitioner's rights under the Federal Civil Rights Act and his Constitutionally protected right to a jury trial.

Whether a jury, under a civil rights action maintained under 42 U.S.C. § 1983, may infer the requisite intentional and purposeful discrimination by actions of City officials without direct testimony of wrongful intent, where substantial evidence is presented to prove violation of the due process clause and equal protection clause of the United States Constitution by City officials' actions including the continued use of an unreasonable and clearly invalid land use ordinance which operated to single out the plaintiff for discriminatory action for the purpose of coercing abatement of a valid non-conforming use of property.

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JURISDICTIONAL BASIS AND GROUNDS FOR REVIEW

The petitioner, William E. Grader, prays that a writ of certiorari issue to review an Appellate Court decision reversing a jury determination and award of damages of $1,650,000 for violation of petitioner's constitutional rights as authorized by the Federal Civil Rights Act, codified as 42 U.S.C. § 1983.

The decision of the Court of Appeals of the State of Washington was entered February 13, 1989, and cited as *Grader v. City of Lynnwood*, 53 Wn.App. 431 (1989) (referred to as Grader II).

Petition for review by the Supreme Court of the State of Washington was denied by order dated June 28, 1989. The jurisdictional basis for review is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the first section of the Fourteenth Amendment to the Constitution of the United States, which provides as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

This case further involves the provisions of Section 42, U.S.C. § 1983 which provides as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State of Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, and immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

This action arises from a regulatory land use action by the City of Lynnwood, whereby City officials sought to condition petitioner's right to develop his property by misconstruing a "site plan ordinance" to require that Grader abate a valid existing non-conforming use on

property adjoining the construction site. Upon proper instructions to a jury, a verdict of liability was entered finding that the actions of City officials constituted an intentional and purposeful violation of Mr. Grader's rights under the Equal Protection and Due Process clauses of the United States Constitution and Constitution of the State of Washington.

Upon appeal, the Court of Appeals reversed the judgment, dismissing the action and awarding costs against Mr. Grader. The petitioner seeks review. This state action was initiated to protect Mr. Grader's rights as authorized by 42 U.S.C. § 1983, and presented substantial federal questions in the original complaint, and thereafter throughout the entire proceedings.

The federal question of violation of constitutional rights was initially presented to a jury, which found in the affirmative. Upon appeal, the Court of Appeals reversed, dismissed and awarded costs, which act, petitioner contends, constituted the substitution of its judgment for that of the jury. The Washington Supreme Court denied discretionary review. The federal question of liability for violation of constitutional rights under 42 U.S.C. § 1983 has been a principal issue throughout the proceedings and has been fully, properly, and timely raised so as to give this Court jurisdiction to review the judgment on writ of certiorari.

The record discloses that William E. Grader suffered economic losses of $1,650,000 when city officials of the City of Lynnwood, Washington stopped his development plans by conduct which a jury determined to have been a purposeful misconstruction of a "site plan" ordinance in a constitutionally impermissive way. The jury found the City to have intentionally and purposefully discriminated in the administration of its laws, constituting a violation of the 14th Amendment Equal Protection clause, and to have knowingly acted in an arbitrary,

unfair and unlawful manner, in violation of the due process clause of the 5th and 14th Amendments.

The petitioner alleged that City officials used the "site plan" ordinance as an excuse to deny his right to develop his property unless he would first abate valid (and constitutionally protected) non-conforming uses of adjoining parcels. Later appeals confirmed that the so-called "Site Plan Ordinance" did not confer authority upon the City officials to require abatement of adjoining parcels. *Grader v. Lynnwood*, 45 Wn.App. 876, 728 P.2d 1057 (1986) (hereinafter referred to as *Grader I*, App. 14a).

Grader presented substantial evidence that the misconstruction of the ordinance was used as a pretext to take valid property rights from him, and that the City went to great lengths to justify and maintain its position, despite the fact that the language of the ordinance itself could not reasonably be construed in the manner asserted by the City. Petitioner even submitted evidence that to justify the strained interpretation the City changed the wording of the ordinance in official presentations to a hearing examiner. (App. 21a)

Substantial evidence was submitted showing Grader's efforts to correct the misinterpretation of the statute, and the City's persistent refusal to read the ordinance as it appeared on its face. The jury accepted the evidence to find against the City. The trial court found sufficient evidence to support the verdict. Upon appeal by the City, the Court of Appeals of the State of Washington reversed, holding that the jury verdict was based upon insufficient evidence, and alternatively finding that Grader had proximately caused his losses by not seeking other administrative relief from City officials in addition to his appeals to the Court of Appeals in *Grader I*.

The Court of Appeals further not only dismissed Mr. Grader's complaint with prejudice, but assessed costs against him, as respondent, in excess of $3,000. This

decision removed Mr. Grader's rights to have the Civil Rights issues resolved by a jury of his peers, either on the original verdict or upon retrial, despite his constitutionally protected rights to a jury trial under the Washington State Constitution (Article 1, Section 12) and the Constitution of the United States.

The effect of this decision is to ratify purposeful misconstruction of ordinances without liability for misconduct, and without regard to the consequences as to individuals resulting from such conduct.

ARGUMENT FOR GRANTING WRIT

Petitioner requests that the writ of certiorari be granted herein because the decision of the state courts finding insufficient evidence, or alternatively that petitioner caused the violation of his own civil rights, operates to rewrite 42 U.S.C. § 1983 to add elements not found in the statute. This is one of the first cases in which liability has been established in a regulatory land use area, and the reversal of the case has substantially impaired the efficacy of the Civil Rights Act and rights protected under federal statutes and the United States Constitution.

It would seem that the appellate Court has attempted to preclude review by using a factual basis for reversal, finding that there was insufficient evidence for liability but ignoring material facts in the record. By the selection of only portions of the record to recite in favor of reversal, a result oriented procedure has resulted, calculated to simultaneously preclude review and to achieve a result which exonerates a municipality from its own misconduct, misconduct which ironically had been previously determined by the same Appellate Court to be wrongful. *Grader I*, *supra*.

Since this is a unique case, applying the provisions of 42 U.S.C. § 1983 to an abuse of regulatory land use by

a municipality, the Supreme Court should review and determine the applicability of this statute to wrongdoing by City officials.

The Supreme Court is empowered to protect individual rights against oppressive actions of government. While a state court may lose sight of the value of individual rights, or may wish to protect the institutions from attack or expense, the higher principles of law must be honored. The Appellate Court has attempted to circumvent rights granted in 42 U.S.C. § 1983 by the long established *sub rosa* practice of changing, ignoring, or misconstruing the facts to reach a desired result. This case does not involve as much a question of fact, but the error in selecting facts to achieve a desired result. By so doing, the Appellate Court abused its judicial discretion to overturn and approve a proven violation of Civil Rights.

The matter of significance is this: by mischaracterizing and ignoring substantial evidence in the record, the violation of Mr. Grader's Civil Rights was affirmed. By mischaracterizing evidence, the Appellate Court has attempted to insulate its wrongful decision from review, while substituting its view and version of the facts for those facts upon which the jury found liability. It is well known that by so doing, this case was partially insulated from review, since reviewing courts are reluctant to intervene to review "factual questions".

In truth, such conduct itself violates substantial Constitutional rights to a jury trial. Further, the decision gives license to municipalities to make pretextual interpretations of statutes to achieve unlawful ends without responsibility for the result. The Appellate Court's conclusions, wholly inconsistent with the facts of the case, license and approve wrongful conduct by City officials.

By this decision, the Appellate Court has undermined 42 U.S.C. § 1983 in the most insidious manner possible,

by ignoring substantial evidence of the intentional and purposeful misconstruction of the ordinance, as well as passing off as inconsequential, actions by the City which stopped a construction project for over two years, causing Mr. Grader to suffer essentially undisputed damages in excess of $1,650,000.

The jury of twelve citizens found the City to be guilty of misconduct: by the typed word of the Court of Appeals that misconduct was changed to conduct deemed merely "improper".

The Constitution of the United States is philosophically unique in that it is designed to protect the rights of an individual against an oppressive government. Juries are the last defense of an individual in the battle against governmental oppression. 42 U.S.C. § 1983 and the right to jury trial thereunder are significant defenses for an individual against abusive government regulation or oppression.

In *Memphis Community School District v. Stachura*, 106 S.Ct. 2537, 2542 (1986) the court held that 42 U.S.C. § 1983 creates a "species of tort liability in favor of persons denied constitutional rights." See also *Brower v. Wells*, 103 Wn.2d 96, 620 P.2d 1144 (1984). These cases are effective to restrain governmental excess only if honored.

In this case, the jury found an "intentional or purposeful discrimination" in the administration of the law. *Snowden v. Hughes*, 321 U.S. 18 (1944); *Stastny v. Board of Trustees*, 32 Wn.App. 239, 251, 647 P.2d 496 (1982).

To overturn this verdict, the Court of Appeals has improperly changed and approved a classification held unconstitutional *Grader I*.

In *Grader I, supra*, page 4 the Court held that the City's interpretation was violative of Grader's right to equal protection. It held that Grader had been singled

out for restrictive treatment from all other potential owners, merely because he owned contiguous *developed* property. It held that the City's improper interpretation of the ordinance operated to unconstitutionally discriminate against Grader.

However, in *Grader II*, the Court would now justify the City's misconstruction in a manner contrary to *Grader I*, to allow a new narrow classification for individuals owning contiguous developed *and* vacant property. This is an illogical and improper "classification" to measure an equal protection violation. In fact, it is an illusory "class" that comes into existence *only* through the City's misconstruction of the ordinance in the first place. There is absolutely no reason to have, let alone analyze, under equal protection law, a special "class" of property owners consisting of owners of both contiguous developed and vacant property. This approach would actually reverse the Appellate Court's decision in *Grader I*, *supra*, and justify the offensive classification used to "interpret" the ordinance by the City initially.

The court's interpretation of the ordinance actually violated the rule that any equal protection analysis requires that the challenged distinction be reasonable in light of the legislation or activity in question. *Parks v. Watson*, 716 F.2d 649, 655 (9th Cir. 1983); *Zobel v. Williams*, 457 U.S. 55 (1982). It violates state rulings that a classification must have a rational relation to *legitimate* purpose of law. *Myrick v. Pierce Cty. Commr's*, 102 Wn.2d 698, 701, 687 P.2d 1152 (1984); and that any classification must be a necessary means of accomplishing a *legitimate* government interest. *Herriott v. Seattle*, 81 Wn.2d 48, 500 P.2d 101 (1972). For equal protection purposes, persons of the "class" must be similarly situated with respect to a *legitimate* purpose of the law. *Harmon v. McNutt*, 91 Wn.2d 126, 130, 587 P.2d 537 (1978). It is impermissible to create a class that exists only because of the City's constitutional violation, and to then use

that classification to justify the avoidance of liability by the City.

The Appellate Court further made the curious Finding that the record failed to show that the City's misdeeds were malicious. While that Finding is disputed, there is no requirement that a § 1983 claimant prove "maliciousness" under the numerous cases pertaining to this statute.

Due process requires a government to treat citizens in a fundamentally fair manner. *Valley View v. Redmond*, 107 Wn.2d 621, 636, 733 P.2d 182 (1986). A substantive due process violation lies in conduct that is knowingly arbitrary, unfair and unlawful. In *Hontz v. State*, 105 Wn.2d 302, 714 P.2d 1176 (1986), the court held "if the statute is unconstitutionally applied, liability attaches". Washington recognized this in *Brower v. Wells*, 103 Wn.2d 96, 690 P.2d 1144 (1984).

Daniels v. Williams, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986) confirms that 42 U.S.C. § 1983 was enacted to provide a remedy for abuse of governmental powers, and applies to deliberate decisions of government officials. The Court of Appeals essentially violates these rulings in its application of the facts to the law.

Grader proved that to justify its misconstruction of the ordinance, the City prepared and relied upon an adulterated rewrite of the ordinance. The Appellate Court's treatment of this exhibit is a clear example of its error in weighing and interpreting evidence in a manner contrary to the inferences drawn by the jury, calling it only a "paraphrasing of an interpretation". This is a "conclusion", a weighing of and characterization of evidence. It could equally be construed as a purposeful mischaracterization of the ordinance which reversed the meaning, prepared to carry out an unlawful purpose. Furthermore, the Appellate Court erroneously inferred or assumed that this act was not harmful. The

evidence supports the Finding that it was a purposeful and significant part of the City's actions.

The secondary Finding, that the failure to apply for a "variance" is an excuse by the Court of Appeals for its decision, not a reason to deny Grader his recovery. In point of fact, it is undisputed that a variance could not provide relief from the ordinance. This jury question was resolved in favor of Grader. Furthermore, exhaustion is not required under Section 1983 to redress civil rights violations. *Patsy v. Board of Regents of St. of Florida*, 457 U.S. 496, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982). Substantive due process is violated at the moment harm occurs. *Rutherford v. Hill*, 780 F.2d 1441, 1447 (9th Cir. 1986).

Finally, the "variance" would not give Grader necessary relief. There is *no* provision for a variance to waive all changes the city demanded for existing use, including the moving of a valuable advertising sign.

The federal decisions on Section 1983 have held that where the official conduct is a "substantial" or "motivating" factor in the constitutional deprivation, causation is established. *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977). In *Westborough Mall, Inc. v. City of Girardeau*, 693 F.2d 733 (8th Cir.) cert. denied, 461 U.S. 945 (1983), the causation of damages from a revision of zoning was held a jury question against the argument of poor business judgment of the owner.

By ignoring and substituting its judgment, opinion, and conclusions for that of the jury on issues of fact and intent, the Court has, without changing the written word, created an injustice of great proportions and emasculated 42 U.S.C. § 1983. The decision creates license for wrongdoing and positive rewards for cover-up and obfuscation of evidence by a municipality.

By categorizing the evidence as "insufficient", where in fact the evidence was utilized by the jury to impose

liability, different and subjective standards of liability (standards known only by the Court of Appeals), have been created. Worse, municipalities are afforded license to violate Constitutional rights, by obfuscating records of intent, maintaining a code of silence, and arguing that the actions were inadvertent. The jury found intentional and purposeful violations of Mr. Grader's rights. The reversal of these findings operates to immunize a municipality from its duty to treat citizens with Due Process of the Law and in accordance with the Equal Protection standards of the Constitution. The Appellate Court has committed an injustice of epic proportions: there is no good reason to insulate this municipality from its wrongdoing. The Congress, in 42 U.S.C. § 1983, intended to impose liability and responsibility in government to honor and respect the Constitutional rights of individuals. The Appellate Court has lost sight of that goal.

CONCLUSION

Wherefore, petitioner respectfully prays that a Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX

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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

No. 20601-0-I DIVISION ONE

WILLIAM E. GRADER,
Respondent,

v.

CITY OF LYNNWOOD, a municipal corporation and political subdivision of the State of Washington,
Appellant.

[Filed: Feb. 13, 1989]

PEKELIS, J.—The City of Lynnwood appeals from a jury verdict in favor of William E. Grader, in which the jury found that the City's interpretation of a land use ordinance violated substantive due process and equal protection of the law, entitling Grader to $1.65 million in damages under 42 U.S.C. § 1983. The City's principal claim is that the trial court erred in failing to dismiss the § 1983 claims as a matter of law. It contends that Grader failed to introduce sufficient evidence to sustain either his equal protection or his due process § 1983 claims, or to prove that the alleged civil rights violations were the proximate cause of his damages.[1]

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[1] The City further contends that the trial court's instructions on § 1983, proximate cause, and damages were erroneous in a number of respects.

Grader cross-appeals from the trial court's denial of his request for attorney's fees and its dismissal of his state law negligence claims. We affirm in part, reverse in part and remand for entry of judgment in favor of the City.

In a prior related action, *Grader v. Lynnwood*, 45 Wn. App. 876, 728 P.2d 1057 (1986) (*Grader I*), this court affirmed the superior court's determination that the city of Lynnwood's interpretation of Lynnwood Municipal Code (LMC) 20.14.040 would violate Grader's right to equal protection.

On October 28, 1982, Grader applied to the City of Lynnwood for a conditional use permit to construct a billiard parlor/warehouse on property contiguous to previously developed property he also owned and which contained valid nonconforming uses. The planning commission approved the conditional use permit on December 9, 1982. The City Council approved the conditional use permit on January 10, 1983.

Grader also needed to obtain a building permit before proceeding with construction. In order to do so, a developer must submit an application to the building department together with a number of plans and documents which then are distributed to the appropriate City departments for approval. The site plans covering parking and landscaping, for example, are reviewed by the planning department. The applicant is then advised either by notations on the plans or by letter of all necessary corrections. If these corrections are made, the building permit is approved.

Grader never submitted a building permit application. Instead, after the issuance of his conditional use permit, he commenced informal negotiations with the planning department with respect to preparation of a site plan for parking and landscaping. Grader testified that he was instructed by a building department official to proceed

in this manner. In the course of submitting several plans and meeting with planning department officials, they informed Grader that he had to abate his nonconforming uses on the contiguous lots. He was told that the basis for this requirement was LMC 20.14.040, which provides that when improvements are allowed on a nonconforming "site" the previously lawful nonconforming uses on that "site" must be abated. The City attorney had previously, in connection with another matter before the planning department, interpreted "site" as used in the ordinance to include contiguous lots under one ownership, whether or not the uses thereon shared access and parking.

It was not disputed that the City's interpretation would require Grader to alter the size and location of a large sign he regarded as crucial to advertising the existing businesses, and to add parking spaces and landscaping to the existing developments. Grader advised the City that these requirements were unreasonable and would force him to break oral and written leases with several of the existing businesses that used the sign. He maintained that the relocation of the sign would cause increased advertising costs and damage the profits of the businesses, both his own and those of his lessees. The planning department officials, in turn, asked for copies of the leases in order to determine whether the City could accommodate Grader's concerns. Grader testified that he decided it was not worth the bother to submit the written leases since he had already explained his oral leases to the City to no avail.

Furthermore, Grader did not apply for a variance. The City's variance ordinance contained provisions which authorized a relaxation of parking requirements under certain circumstances. The City had previously considered a relaxation of the sign code in a situation involving an existing lease. Grader testified no one ever advised him of the variance procedure. It appears from

the record, however, that he did at least have a copy of the variance ordinance.

On numerous occasions, in person and by letter, Grader challenged City employees and officials about its interpretation, which he contended was unconstitutional. In spite of his disagreements with them, Grader testified that the employees in the planning department were always helpful and courteous, and that the members of the planning commission were enthusiastic about his project.

Finally, Grader asked the City's hearing examiner to determine whether the City's interpretation of LMC 20.14.040 was correct. The hearing examiner upheld the City's interpretation, and that ruling was affirmed by the City Council. Grader then appealed to the superior court, where he prevailed. This court affirmed the superior court on the interpretation of the ordinance on October 6, 1986. *Grader I*, 45 Wn. App. at 876, 877.

During the pendency of the City's appeal to this court in that initial action (*Grader I*), Grader filed the instant damages action against the City. The trial in this action commenced on March 25, 1987. Grader sought damages from the City for mental anguish and for delays resulting both in loss of anticipated profits and increased construction costs. He alleged due process and equal protection violations, constituting violations of 42 U.S.C. § 1983, as well as claims of negligence and tortious interference with business expectations. Grader also sought attorney's fees under 42 U.S.C. § 1988.

At trial Grader testified that he never obtained bids on the landscaping, sign relocation or parking striping improvements that would have abated the nonconforming conditions. He had an oral commitment for construction financing, but testified that he was unable to get financing since there was litigation concerning the project. He also testified that it was his business judgment that

it would not be appropriate to proceed with the financing while *Grader I* was pending. He therefore did not pursue the project then or at any time, even following this court's favorable determination in *Grader I*.

The City made several motions for dismissal of all claims, each of which was denied, with the exception of the state law tort claims which the trial court dismissed on the grounds of quasi-judicial immunity and the public duty doctrine. On the § 1983 claims the jury returned a verdict of $1.65 million in favor of Grader. The trial court denied the City's motion for judgment notwithstanding the verdict or a new trial, and entered judgment on the verdict on June 5, 1987. Grader's post-trial motion for an award of attorney's fees was denied.

The City appeals from the verdict and Grader cross-appeals from the dismissal of the state tort claims and the denial of attorney's fees.

I. Sufficiency of Evidence

The City argues first that Grader's § 1983 claims should have been dismissed because he failed to introduce sufficient evidence of (1) intentional or purposeful discrimination with regard to his equal protection claim or (2) arbitrary, unfair and unlawful conduct with regard to his due process claim.[2] Grader responds that the City's misinterpretation of its ordinance, misrepresentation of the text of the ordinance to the hearing examiner, and persistence of the City in maintaining its position provide sufficient evidence to sustain his claims.

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[2] The City also argues as a threshold matter that Grader's § 1983 claims should be dismissed because he failed to show a regulatory taking. We reject the City's premise that all § 1983 claims involving land use must show a regulatory taking. *See, e.g., Brower v. Wells*, 103 Wn.2d 96, 106-07, 690 P.2d 1144 (1984); *Shelton v. College Station*, 754 F.2d 1251, 1257 (5th Cir. 1985), *cert. denied*, 477 U.S. 905, 91 L.Ed.2d 566, 106 S. Ct. 3276 (1986); *Altaire Builders, Inc. v. Horseheads*, 551 F. Supp. 1066, 1070 (W.D.N.Y. 1982).

A sufficiency of the evidence challenge in the form of a motion for a directed verdict or a judgment notwithstanding the verdict admits the truth of the nonmoving party's evidence and all reasonable inferences which can be drawn therefrom. This court grants such motions only where it can be held as a matter of law that there is no competent evidence or inferences to be drawn threfrom which would sustain a jury verdict in favor of the nonmoving party. *Manzanares v. Playhouse Corp.*, 25 Wn. App. 905, 908, 611 P.2d 797 (1980); *see also Chapman v. Black*, 49 Wn. App. 94, 97, 741 P.2d 998, *review denied*, 109 Wn.2d 1005 (1987).

A cognizable claim for relief under 42 U.S.C. § 1983 must allege that (1) defendant acted under color of state law, and (2) defendant's conduct deprived the plaintiff of rights, privileges or immunities protected by the United States Constitution. *Brower v. Wells*, 103 Wn.2d 96, 104-05, 690 P.2d 1144 (1984). Since the second prong is at issue here, we look at the elements necessary to find that Grader's constitutional rights were violated.

To sustain an equal protection claim, one must show intentional or purposeful discrimination. *Snowden v. Hughes*, 321 U.S. 1, 8, 88 L. Ed. 497, 64 S. Ct. 397 (1944). The discriminatory purpose must be clearly shown since such a purpose cannot be presumed. *Snowden, supra; Stastny v. Board of Trustees*, 32 Wn. App. 239, 251-52, 647 P.2d 496, *review denied*, 98 Wn.2d 1001 (1982), *cert. denied*, 460 U.S. 1071, 75 L. Ed. 2d 950, 103 S. Ct. 1528 (1983); *see also Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265-66, 270, 50 L. Ed. 2d 450, 97 S. Ct. 555 (1977). Allegations of merely "wrongful" or "unlawful" conduct will not be sufficient; rather, a showing of purposeful discrimination or at least an allegation that the misdeeds were knowing or reckless is necessary to sustain a § 1983 action. *Harrison v. Brooks*, 446 F.2d 404, 407 (1st Cir. 1971); *Williams v. Patton*, 410 F. Supp. 1, 3 (E.D. Pa.

1976). Where official action purports to conform to the applicable law, "an erroneous or mistaken performance of the statutory duty . . . is not without more a denial of the equal protection of the laws." *Snowden*, 321 U.S. at 8.

Grader's equal protection claim fails in light of the fact that there is absolutely no evidence that the City intentionally singled him out for discriminatory treatment under its interpretation of this ordinance. Indeed, its interpretation was triggered by another property owner's query to the planning department, and was applied uniformly to Grader. Nor has Grader shown knowing or reckless misdeeds by the City. At most, the facts indicate that City officials interpreted the ordinance in a way which was ultimately adjudicated as improper. There is nothing in *Grader I* or in the facts of this case indicating that the City's interpretation was frivolous or malicious. This case is therefore distinguishable from those in which § 1983 plaintiffs have prevailed as a result of showing inconsistent treatment, personal animus or political motives. *See, e.g., Shelton v. College Station*, 754 F.2d 1251, 1254 (5th Cir. 1985), *cert. denied*, 477 U.S. 905, 91 L. Ed. 2d 566, 106 S. Ct. 3276 (1986) (seemingly arbitrary and inconsistent denials of parking variances); *Wilkerson v. Johnson*, 699 F.2d 325 (6th Cir. 1983) (intentional misapplication of state licensing law in denying occupational license); *Cordeco Dev. Corp. v. Vasquez*, 539 F.2d 256, 260 (1st Cir. 1976), *cert. denied*, 429 U.S. 978, 50 L. Ed. 2d 586, 97 S. Ct. 488 (1976) (political and personal motives shown in efforts to defeat sand extraction permits).

Grader's substantive due process claims similarly fail. To show a denial of substantive due process, the claimant must show conduct that is arbitrary and unreasonable. *Altaire Builders, Inc. v. Horseheads*, 551 F. Supp. 1066, 1069 (W.D.N.Y. 1982). The fact that the City was steadfast in its position and never sought an outside

opinion does not demonstrate arbitrary or unreasonable conduct. Again, neither the facts nor the court's opinion in *Grader I* gives any indication that the City's position was substantially frivolous or ill-intentioned.

Grader also alleges that the City supplied the hearing examiner with an adulterated version of LMC 20.14.040 that supported its interpretation. At best, it appears that the hearing examiner may have been shown a document which paraphrased the ordinance for the purpose of illustrating the City's interpretation of the language in question. This, in itself, is not sufficient to establish a due process claim. Our review of the record of the hearing demonstrates that the hearing examiner clearly realized his task was to resolve a dispute over the interpretation of the ordinance. It is inconceivable that the ordinance itself was not before him. At the very least, the record clearly shows that he reviewed a letter Grader submitted which accurately quoted the disputed portion of the ordinance.

The mere fact that the City attorney's legal interpretation of the statute was ultimately found to be erroneous also does not rise to the level of a due process deprivation. Injury caused by negligent conduct is not sufficient to establish a cause of action under § 1983. *Daniels v. Williams*, 474 U.S. 327, 330, 88 L. Ed. 2d 662, 106 S. Ct. 662 (1986).[3] Without more, the City attorney's act of interpreting the ordinance and the City's decision to

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[3] Grader relies to the contrary on *Pembaur v. Cincinnati*, 475 U.S. 469, 89 L.Ed.2d 452, 106 S. Ct. 1292 (1986), wherein liability was imposed under 42 U.S.C. § 1983 as a result of a prosecutor's considered legal decision to command police officers to forcibly enter plaintiff's clinic in violation of the Fourth Amendment. We decline to extend the *Pembaur* holding to the facts presented here. Not only are the constitutional provisions at issue different, but it appears that *Pembaur* falls into that line of cases in which a single, unusually egregious incident is held to create § 1983 liability. *See Hontz v. State*, 105 Wn.2d 302, 313, 714 P.2d 1176 (1986) (citing *Martini v. Russell*, 582 F. Supp. 136 (C.D. Cal. 1984)).

abide by the interpretation until this court disallowed it cannot even be characterized as negligent. Thus, Grader has not presented sufficient evidence to sustain either his equal protection or his due process § 1983 claim, and the trial court erred in denying the City's motion to dismiss.

Although our holding effectively terminates Grader's § 1983 claims, an alternative reason, discussed below, exists for dismissal of these claims.[4]

II. Proximate Cause

The City contends that Grader failed to show that its interpretation of the ordinance was the cause in fact and legal cause of his damages due to delayed construction. It claims he could have applied for a building permit or variance, but instead exercised his own personal business judgment not to do so. It further argues that Grader's failure to supply to the City copies of the leases he alleged would prohibit him from abating his nonconforming uses prevented it from working toward an accommodation with him. On these grounds, the City again seeks dismissal of Grader's civil rights claims as a matter of law.

Grader asserts that the City proximately caused his damages when it knew of his objection to its interpretation and refused to reverse its position. He also contends that to seek a variance would have been futile since the City had already indicated its position. Moreover, he argues that he could not determine the size of building he could construct until the site plan was approved and therefore he could not get a construction loan.

When all inferences from the evidence are incapable of reasonable doubt, a reviewing court can decide proxi-

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[4] We do not, however, find it necessary to reach the issues the City raises relating to alleged instructural errors.

mate cause as a matter of law. *See Bernethy v. Walt Failor's, Inc.*, 97 Wn.2d 929, 935, 653 P.2d 280 (1982). Proximate cause consists of two elements: cause in fact and legal causation. *Hartley v. State*, 103 Wn.2d 768, 777, 698 P.2d 77 (1985). Cause in fact refers to the "but for" consequences of an act, that is, the immediate connection between an act and an injury. *See King v. Seattle*, 84 Wn.2d 239, 249, 525 P.2d 228 (1974). Legal causation rests on policy considerations as to how far the consequences of defendant's act should extend. It involves a determination of whether liability should attach as a matter of law even if the proof establishes cause in fact. *Hartley*, 103 Wn.2d at 779; *King*, 84 Wn.2d at 250.

In *King v. Seattle*, the Supreme Court refused to find that the City's denial of street use and building permits proximately resulted in the developers' damages for delayed construction. In that case the developers had voluntarily exercised their business judgment in declining to pursue all of their administrative remedies, and they had not attempted to avoid their damages. *King*, 84 Wn.2d at 250-51. Similarly, in *Hillis Homes, Inc. v. Snohomish Cy.*, 32 Wn. App. 279, 647 P.2d 43, *review denied*, 98 Wn.2d 1011 (1982), the court followed the proximate cause analysis of *King* and denied a developer consequential damages where the county failed to act within 90 days on an application for a preliminary plat, as required by statute. The court stated:

> The County's liability cannot be premised on the developer's independent business judgment that it would be move advantageous to informally work with the County rather than promptly pursuing its legal remedies once the 90 days had expired.

Hillis, 32 Wn. App. at 285. Similar results were reached in *Alger v. Mukilteo*, 107 Wn.2d 541, 730 P.2d 1333 (1987) and *Pleas v. Seattle*, 49 Wn. App. 825, 746 P.2d 823 (1987), *review granted*, 110 Wn.2d 1021 (1988).

Here, Grader exercised his own business judgment in a number of respects which preclude a finding that the City's actions were the proximate cause of his damages. First, Grader decided that it would be preferable not to abate the nonconforming uses of his adjoining property because he wished to maintain a consistent relationship with the existing businesses. In addition, he independently decided not to produce the leases as requested, not to apply for a building permit, and not to seek a variance. Thus, the issue of proximate cause should not have gone to the jury, and Grader's civil rights claims should have been dismissed as a matter of law.

III. State Law Tort Claims

On cross appeal, Grader challenges the dismissal of his state law negligence claims, which the trial court rejected on the grounds of quasi-judicial immunity.[5] He asserts that the wrong against him was complete at the time of the planning department's disapproval of his site plan, which was an operational, not an executive, function. The City replies that Grader's hearings before the hearing examiner and the City Council constituted the actual decision and that those were quasi-judicial proceedings.

The hearing examiner's proceedings and the City Council's proceedings were the City's final decisions with regard to the interpretation of LMC 20.14.040, and were clearly quasi-judicial in nature. That is, their work was " 'functionally comparable to that of a judge' ". *See Jensen v. Torr*, 44 Wn. App. 207, 213, 721 P.2d 992, *review denied*, 107 Wn.2d 1004 (1986) (quoting *Rayburn v. Seattle*, 42 Wn. App. 163, 166, 709 P.2d 399 (1985), *review denied*, 105 Wn.2d 1007 (1986)). Thus, the City

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[5] Grader also appeals from the denial of his claim for attorney's fees under 42 U.S.C. § 1988. However, since he has not prevailed on his § 1983 claims, he cannot recover his attorney's fees.

could not be held liable in tort, and the trial court properly dismissed the state law tort claims.[6]

In sum, we reverse, dismissing Grader's claims under 42 U.S.C. § 1983, and affirm the trial court's dismissal of Grader's state law tort claims. Since the City has substantially prevailed on review, it may be awarded its costs on appeal. *See* RAP 14.2.

/s/ Pekelis, J.

WE CONCUR: Schoefield, J.

I would reverse the judgment entered on the verdict because there is no evidence in the record of discrimination. I join in affirming the judgment of dismissal of the State law tort claims and the allowance to the City of its costs on appeal.

Ward Williams

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[6] We therefore do not reach the City's additional argument that it is immune from suit under the discretionary and public duty doctrines.

* Judge Ward Williams is serving as a judge pro tempore of the Court of Appeals pursuant to RCW 2.06.150.

THE SUPREME COURT
STATE OF WASHINGTON

June 28, 1989

Cogdill, Deno & Williams
Mr. James Deno
3232 Rockefeller Avenue
Everett, Washington 98201

Merrick, Hofstedt & Lindsey
Mr. H. Roland Hofstedt
Ms. Nancy K. McCoid
710 Ninth Avenue
Seattle, Washington 98104

Re: Supreme Court No. 56115-0—William E. Grader V. City of Lynnwood

Court of Appeals No. 20601-0-I

Counsel:

The above entitled petition for review was considered by the Court on its June 28, 1989, petition for review calendar.

The petition was denied by order number 193/55 filed on June 28, 1989.

Sincerely,

/s/ C. J. Merritt
C. J. MERRITT
Supreme Court Clerk

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

No. 15130-4-I. Division One

WILLIAM E. GRADER,
Respondent,

v.

THE CITY OF LYNNWOOD,
Appellant.

[October 6, 1986]

Patrick M. Curran and *Riach, Gese, Scather, Watts & Curran*, for appellant.

James E. Deno and *Cogdill, Deno, Millikan & Carter*, for respondent.

[As amended by order of the Court of Appeals December 9, 1986.]

PEKELIS, J.—The City of Lynnwood appeals the trial court's determination that the City's interpretation of Lynnwood Municipal Code (LMC) 20.14.040 is an unconstitutional exercise of the City's police power and violates William E. Grader's right to equal protection. We affirm the trial court's decision on the latter ground.

William E. Grader purchased 11 contiguous platted lots located within the city of Lynnwood in approximately 1962. Lots 12 and 13 of this plat were previously developed as a retail auto parts store and machine shop known as "Bill's Auto Parts" and lots 24 and 25 as a building and business known as "Stan's Auto Rebuild." Neither development meets existing city codes, but both contain valid nonconforming uses, having been in existence when the current codes were enacted.

In 1982, Grader decided to construct a warehouse and billiard lounge on the remaining contiguous vacant lots. He applied to the City for a permit to construct a development which would be entirely independent of both existing developments. Not only would the new building be constructed on different lots, it would have separate street access and parking facilities and would serve an entirely different purpose.

A conditional use permit was issued by the City on January 10, 1983, but it was conditioned on the abatement of the valid nonconforming uses on Grader's contiguous lots. This would require Grader to alter the size and location of a large sign, landscape the existing developments, paint stripe dividers in their parking areas, and generally comply with current developmental standards, all at substantial expense. The City based its determination on LMC 20.14-.040(c)(2) which provides that when major alterations are permitted on a nonconforming "site," the previously lawful nonconforming structures or uses on that "site" must be brought into compliance with existing code. The parties agree that Grader's proposed development constitutes a "major alteration" as defined in the ordinance and would conform to all existing code requirements. Their disagreement centers on whether the existing businesses and the proposed development constitute a single "site."

LMC 20.14.040 defines "site" as follows:

> "site," for purposes of this chapter, means a lot or contiguous lots under one owner or single association of individuals within the same zone and with established mutual access, circulation and shared parking facilities.

The City's position is that LMC 20.14.040 defines a "site" as a lot or contiguous lots that are either (1) under one owner *or* (2) under a single association of individuals

within the same zone and with established mutual access, circulation and shared parking facilities.

Grader, on the other hand, argues that LMC 20.14.040 must be read as defining "site" as a lot or contiguous lots (1) under one owner or a single association of individuals within the same zone *and* (2) with established mutual access, circulation and shared parking facilities.

Grader appealed the City's determination to the Lynnwood hearing examiner who upheld the City's interpretation of the ordinance. Grader also contended that the City's interpretation would render the ordinance unconstitutional. The hearing examiner declined to resolve the constitutional issues raised, properly finding that these were matters only the courts could address. *Yakima Cy. Clean Air Auth. v. Glascam Builders, Inc.*, 85 Wn.2d 255, 257, 534 P.2d 33 (1975).

After the Lynnwood City Council denied his appeal, Grader applied for a writ of certiorari in the Snohomish County Superior Court challenging the constitutionality of the City's interpretation of the ordinance as applied to his proposed development. He claimed that it was first, violative of Grader's right to equal protection; second, constituted an improper use of the City's police power; and third, was unconstitutionally vague. The court reversed the hearing examiner concluding that the City's interpretation was unconstitutional and adopting Grader's proposed interpretation of the ordinance, thereby avoiding its invalidation. The City has appealed.

Pursuant to RCW 7.16.060, the superior court reviews only the administrative record below and takes no new evidence. Therefore, the trial court need enter no findings of fact or conclusions of law. *King Cy. Water Dist. 54 v. King Cy. Boundary Review Bd.*, 87 Wn.2d 536, 544, 554 P.2d 1060 (1976). Although the trial court did enter findings and conclusions herein, this does not in itself constitute grounds for reversal but is mere sur-

plusage. *See Spokane Cy. Fire Protec. Dist. 8 v. Spokane Cy. Boundary Review Bd.*, 27 Wn. App. 491, 493, 618 P.2d 1326 (1980). The trial court adopted the proper standard of review to resolve the legal issues before it, determining that the administrative action was arbitrary and capricious or contrary to law. *Anderson v. Island Cy.*, 81 Wn.2d 312, 316-17, 501 P.2d 594 (1972). This court reviews the administrative record in rendering its decision and does not rely upon the trial court's findings and conclusions. *Spokane Cy. Fire Protec. Dist. 8*, at 493.

We recognize that as the enforcing agency herein, the City's interpretation of the ordinance is entitled to substantial weight. *State ex rel. Pirak v. Schoettler*, 45 Wn.2d 367, 371-72, 274 P.2d 852 (1954). Nevertheless, the ordinance must be interpreted so as to effectuate the objective or intent of the enacting body. *Amburn v. Daly*, 81 Wn.2d 241, 245, 501 P.2d 178 (1972). In addition, ordinances must be interpreted according to the plain and ordinary meaning of the language used. *Boss v. Spokane*, 63 Wn.2d 305, 307, 387 P.2d 67 (1963).

The disputed portion of the ordinance is the definition of a "site." Following the words "lot or contiguous lots" are a series of qualifying phrases which concern, respectively: ownership, zone location, *and* mutuality of facilities. Each of these phrases acts to describe the "lot or contiguous lots" which will constitute a "site" if, and only if, all three sub-descriptions apply. Had the enacting body intended to single out lots under a common owner for disparate treatment, as the City argues, it could readily have done so by reinserting the words "lot or contiguous lots" after the word "or" and before the word "single." *See Dando v. King Cy.* 75 Wn.2d 598, 603, 452 P.2d 955 (1969).

Furthermore, requiring abatement of nonconforming uses on adjacent but separate developments due solely to common ownership is an inefficient and illogical means of

achieving the City's goal of promoting public safety and welfare. The following hypotheticals illustrate the flaw in the City's argument. Were Grader proposing the identical development on property separated by even one lot from his existing developments or were he to sell the proposed building site to a third party, the ordinance would not apply.

In contrast, we believe Grader's interpretation to be a grammatically and pragmatically correct statement of the legislative body's intent. It requires any owner or association of owners, whose property is located within one zone *and* who share access, circulation and parking facilities, to upgrade nonconforming uses on that property as a condition to further development. This interpretation also reasonably effectuates the goal of having an entire *interrelated* development upgraded when a major alteration of any part thereof is undertaken. Thus, the public benefit of the ordinance could not be averted by sale of all or any part of the property as its requirements attach to characteristics of the development, rather than the nature of the ownership.

Moreover, we recognize that we are obligated to construe the ordinance, if possible, in such a manner as to uphold its constitutionality. *Silver Shores Mobile Home Park, Inc. v. Everett*, 87 Wn.2d 618, 624, 555 P.2d 993 (1976); *Lenci v. Seattle*, 63 Wn.2d 664, 667-68, 388 P.2d 926 (1964). Grader contends that the City's interpretation is not only illogical and unlikely, but unconstitutional. In analyzing whether an ordinance violates equal protection, the minimum scrutiny test is used where neither fundamental rights nor suspect classification is at issue. This test is satisfied if (1) the legislation treats all members within the designated class alike, (2) there are reasonable grounds to distinguish between those within and those outside the class, and (3) the classification has a rational relationship to the purpose of the enactment.

Paulson v. County of Pierce, 99 Wn.2d 645, 652-53, 664 P.2d 1202, *appeal dismissed*, 464 U.S. 957 (1983).

The City's interpretation fails the second prong of the minimum scrutiny test. The City concedes that the class created by its interpretation is only those persons who own contiguous parcels, one of which is the situs of a nonconforming use and the other, the subject of a proposed major alteration. The City has failed to present any reasonable argument for distinguishing this class from other property owners. We note that a single association of individuals, unlike single owners, would be required to abate nonconforming uses on adjoining property only when the properties had "established mutual access, circulation and shared parking facilities." Similarly, common owners of noncontiguous lots would not be required to abate nonconforming uses on one to proceed with development on another.

Furthermore, the third prong of the minimum scrutiny test is not met by the City. The election to develop one parcel of property owned by an individual is not rationally related to the municipality's legitimate interest in an otherwise entirely distinct development simply because it is contiguous and owned by that same individual. As noted earlier, the owner can avoid the very real economic penalty of the ordinance by selling the undeveloped property, leaving the new owner free of the expense of abating nonconforming use.

Grader's construction of the ordinance, on the other hand, is not only sensible, but creates no constitutional infirmity. Thus, the ordinance can be properly upheld by adopting this interpretation. In light of this determination, we need not address Grader's police power or vagueness arguments. *Johnson v. Morris*, 87 Wn.2d 922, 931, 557 P.2d 1299 (1976); *Hall v. American Nat'l Plastics, Inc.*, 73 Wn.2d 203, 205, 437 P.2d 693 (1968).

Affirmed.

SWANSON and WEBSTER, JJ., concur.

TRIAL EXHIBIT 28
[*Grader II*]

The City literally changed the ordinance from

> 'Site' for purposes of this chapter means a lot or contiguous lots under one owner or single association of individuals within the same zone and with established mutual access, circulation and shared parking facilities.

to

> 'Site' for purpos.s of this chapter means a lot or *shall mean:* a lot or contiguous lots *that are either*
>
> [*1*] under one owner
>
> or
>
> [*2*] *a* single association of individuals within the same zone and with established mutual access, circulation and shared parking facilities.

(actual changes of words, numbers and punctuation emphasized)